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In The

Supreme Court of the United States

RUBY McDANIEL, FRANCIS PAGNANELLI, JOSEPH O'HARA, JOSEPH GREGG, JAMES McWILLIAMS, WILLIAM CONLON, EDWARD GERLACH, CHARLES RADICH, OTTO BUCHTA, and WILLIAM RAISER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

The Circuit Courts Are Split On How To Interpret 18 U.S.C. Sec. 248's Motive Requirement

The current confusion and disagreement among the Circuit Courts as to how FACE's "because" language should be interpreted suggests that a decision from this Court clarifying FACE's motivational element would be timely and helpful. A district court in the Seventh Circuit, in a decision whose reasoning has not been questioned in that Circuit, found that FACE "requires the government to prove not only the act and the intent, but also the requisite reason or motive for the intended action; here, to prevent the receipt or provision of reproductive health services." *United States v. Wilson*, 2 F. Supp. 2d 1170, 1171-72 (E.D. Wis. 1998). The *Wilson* court held FACE's motive requirement was satisfied by proof that the defendant's motivation "was to protect pre-born babies from being killed in their mothers' wombs" because this is a "reproductive health service" under "Congress' Orwellian definition" of that term. Id., at 1172. The *Wilson* court explicitly recognizes a motivational requirement above and beyond proof of act and intent. Its reading of the requisite motive, however, is broader than that specified by the statute, which describes two scenarios: one in which a particular person is targeted *"because that person is or has been* . . . obtaining or providing reproductive health services," and one in which a particular person, or more generally any class of persons is targeted *"in order to intimidate* such person or any other person or any class of persons from . . . obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1) (emphasis supplied). Both of these motivational scenarios are more

limited than the broad "prevent[ion] [of] the receipt or provision of reproductive health services." In the first, a specific person is targeted because that person "is or has been" obtaining or providing abortions; in the second, the motive must be "to intimidate" others from obtaining or providing abortions.

The Eighth Circuirt, in *United States v. Dinwiddie*, 76 F. 3d 913, 923 (8th Cir. 1996), also explicitly recognized FACE's motive requirement, holding that it accomplished "the perfectly constitutional task of filtering out conduct that Congress believes need not be covered by a federal statute. Congress enacted FACE to prohibit conduct that interferes with the ability of women to obtain abortions. . . . FACE's motive requirement targets this conduct while ensuring that FACE does not federalize a slew of random crimes that might occur in the vicinity of an abortion clinic." While in agreement with *Wilson* as to the existence of an explicit motive requirement, the Eighth Circuit's view of the prohibited motive seems to be far more expansive. While the *Wilson* court found that the requisite motive involved the prevention of abortions, the *Dinwiddie* court holds that it demands only the desire to interfere with abortions. Apparently the only conduct clearly outside the statute for the Eighth Circuit are "random crimes" arbitrarily occurring nearby an abortion clinic. In fact, the *Dinwiddie* court gives as an example of conduct covered by the statute "striking employees . . . obstructing access to a clinic in order to stop women from getting abortions." *Id.* But what about a labor strike motivated not by the desire to stop women from getting abortions, but by the desire to express dissatisfaction with employment conditions? Under *Wilson*,

such strikers would not be guilty of violating the statute, while under *Dinwiddie* they evidently would be.

Added to this mix is the Second Circuit's decision, relied upon by the Solicitor General in this case, in *United States v. Weslin*, 156 F. 3d 292, 298 (2d Cir. 1998), in which the description of FACE's motivational element is badly botched. The Second Circuit finds no explicit motivational element in the statute, explaining that "defendants, whatever their motive may have been, did intend to obstruct and interfere with the obtaining and provision of reproductive health services as defined by Congress. That is all the intent that the statute requires." The *Weslin* formulation is the broadest and the least faithful to the statute of the three. Due to the confusing discrepancy between *Weslin*, *Dinwiddie*, and *Wilson*, a review in Petitioners' case, and the resulting clarification of FACE's motivational element, would be highly valuable.

In a recent case involving a bribery statute with similar "because" language, this Court found that, in "an area where precisely targeted prohibitions are commonplace, . . . a statute . . . that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *United States v. Sun Diamond Growers*, 119 S. Ct. 1402, 1410 (1999). Given the number of discrimination statutes upon which FACE was modeled, and their carefully targeted prohibitions on various forms of forbidden motivation, FACE should also be narrowly construed to require a clear showing of the requisite motive: "because that person is or has been, or in order to intimidate such person or any other person or any class of persons from . . . obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1). For

this reason, the stipulation that Petitioners blockaded the clinic "in order to prevent people from receiving and [the clinic] staff from providing abortions" (Br. 5) is not sufficient, without further proof, to demonstrate that Petitioners acted pursuant to the requisite motive. The stipulation is not specific enough to demonstrate that Petitioners intentionally interfered with any particular person "because *that person is or has been* . . . obtaining or providing reproductive health services" so the first motivational scenario, described above, is not implicated. 18 U.S.C. § 248(a)(1) (emphasis supplied). The stipulation says nothing about any desire on the part of Petitioners to intimidate any person or class of people, so the second motivational scenario also fails to describe the stipulation.[1]

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September 30, 1999

Respectfully submitted,

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[1] Petitioners gratefully acknowledge the pro-bono briefing services of law student Joel Thollander on this Reply Brief in support of their Petition.